Supreme Court, U. S.
FILED
FEB 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1160

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME AND ALLIED HEALTH SERVICES UNION, SEIU, AFL-CIO,

Petitioner,

—v.—

THE LONG ISLAND COLLEGE HOSPITAL,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME AND ALLIED HEALTH SERVICES UNION, SEIU, AFL-CIO,

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THE LONG ISLAND COLLEGE HOSPITAL,

and

NATIONAL LABOR RELATIONS BOARD,

*Respondents.**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit dated November 17, 1977.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is unofficially reported at 96 LRRM 3119 (1977) [App. A 1-28].** The decision and order of

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* The American Hospital Association appeared *amicus curiae* before the Court of Appeals.

** Refers to Appendix of this petition.

the National Labor Relations Board, reviewed by the Court of Appeals, is reported at 228 NLRB No. 13 (1976) [App. B 1-23].

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 17, 1977. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented for Review

1. Whether the National Labor Relations Board could grant comity to a New York State Labor Relations Board unit determination finding a hospital maintenance unit appropriate for purposes of collective bargaining.

2. Whether, regardless of the means by which it concludes that a hospital maintenance unit is appropriate, the National Labor Relations Board may certify a collective bargaining representative based on the results of an election already conducted by the New York State Labor Relations Board.

Statutes Involved

Section 705(2) of the New York Labor Relations Act provides:

> "The board [SLRB] shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft, or in the case of a non-profitmaking hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining."

Section 9(b) of the National Labor Relations Act, 29 U.S.C. § 159(b), provides, in pertinent part:

> "The Board [NLRB] shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation . . . ."

Statement of the Case

On July 1, 1963, Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, SEIU, AFL-CIO ("Local 144") filed a petition with the New York State Labor Relations Board ("SLRB") seeking certification as the collective bargaining representative of the service and maintenance employees of Long Island College Hospital ("LICH"). At the time and until 1974, such hospitals were excluded from the coverage of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141, *et seq.* Another union, the Maintenance Division of the Building and Construction Trades Council ("Maintenance Division") subsequently filed a petition in the representation proceeding and sought a unit limited to skilled maintenance employees. LICH argued for a single overall unit. The SLRB held a hearing on the issue of appropriate bargaining unit.

In its decision, reported at 27 SLRB 405 (1964), the SLRB weighed the factors that the maintenance employees were a homogeneous group of skilled employees having no interchange with service employees against its policy of avoiding over-compartmentalization of hospitals into numerous small bargaining units and found that the considerations were evenly balanced. Accordingly, the SLRB concluded that it would ascertain, by a self-determination election, the desires of the skilled maintenance employees as to whether they preferred to belong to a separate unit or to a larger unit including the service employees.

The SLRB then directed an election in which service employees were asked whether or not they desired to be represented by Local 144. The maintenance employees

were asked to vote on three questions: (1) whether they wanted a separate unit of maintenance employees only; (2) if there were a separate unit, whether they desired to be represented by Local 144, the Maintenance Division, or neither; (3) if there were a combined unit of service and maintenance employees, whether they desired to be represented by Local 144. After the vote, the SLRB was to proceed as follows: If the majority of the answers to the first question were affirmative, it would find a separate maintenance unit to be appropriate and tally the votes of those employees on the second question, disregarding the third question. In that event, the SLRB would find a separate unit of service employees appropriate and tally the votes of those employees. On the other hand, if the majority of the voters did not answer the first question affirmatively, the SLRB would find a combined unit of service and maintenance employees to be appropriate. In that event, it would mingle the ballots of the service employees with those of the maintenance employees, tallying the votes of the maintenance employees on the third question and those of the service employees.

Upon a tally of the ballots, a majority of the ballots cast by the maintenance employees on the first question favored a separate maintenance unit. On the second question, a majority favored Local 144. The service employees voted against union representation. On December 28, 1964, after due consideration of LICH's objections to the election, the SLRB certified Local 144 as the representative of the maintenance employees.

LICH refused to bargain with Local 144, contending, among other things, that the unit was inappropriate. Local 144 then attempted to invoke Section 716 of the New York

Labor Relations Act, which provided for mediation, fact-finding and arbitration of disputes between unions and non-profit hospitals. LICH sought to enjoin this procedure as an improper remedy, and ultimately prevailed. *Long Island College Hospital* v. *Catherwood,* 23 N.Y.2d 20 (1968), appeal dismissed, 394 U.S. 716 (1969). Then Local 144 filed an unfair labor practice charge with the SLRB. At the hearing, LICH contested the appropriateness of the unit. The SLRB ruled in favor of Local 144, which decision was upheld. *Long Island College Hospital* v. *New York SLRB,* 32 N.Y. 2d 314 (1973), cert. denied, 415 U.S. 957 (1974).

LICH thereupon entered into negotiations with Local 144, noting that it was bargaining without prejudice to its position that the unit was inappropriate. On August 25, 1974, the NLRA was amended to include non-profit hospitals within its coverage. Public Law 93-360. The amendment pre-empted further state action in that area. In August 1975, LICH abruptly discontinued negotiating with Local 144 upon learning of a decision by the Regional Director of NLRB Region 2 which, in LICH's view, supported its position. Local 144 then filed a refusal to bargain charge with the NLRB, which charge again permitted LICH to test the appropriateness of the unit. On December 31, 1975, the Regional Director of Region 2 issued a complaint. A hearing was held before an Administrative Law Judge ("ALJ") in which testimony was taken on present condition at LICH as it related to the appropriateness of the maintenance unit.

The ALJ ruled on June 4, 1976 that the SLRB certification should be honored, quoting the NLRB's statement in *Memorial Hospital of Roxborough,* 220 NLRB 402 (1975) to the effect that the NLRB will:

> "[R]ecognize the results of an election conducted by a responsible state agency, and therefore extend comity to a certification issued pursuant to such an election, where the state agency's election procedures conform to due-process requirements and effectuate the policies of the Act." (at 403)

The ALJ concluded that the conditions for comity were satisfied, held that LICH had violated §§8(a)(1) and (5) of the NLRA, 29 U.S.C. §§158(a)(1) and (5), and recommended a bargaining order and a broad cease and desist order. LICH then filed exceptions to the ALJ's decision.

On October 18, 1976, while this matter was pending before the NLRB, the United States Court of Appeals for the Third Circuit decided *Memorial Hospital of Roxborough* v. *National Labor Relations Board,* 545 F. 2d 351 (3d Cir. 1976). That case held that rather than extending comity to a state agency's unit determination, the NLRB was required to exercise its own discretion in determining the appropriateness of a bargaining unit, especially in light of the legislative history of the amendment to the NLRA regarding non-profit hospitals.

In its decision and order dated February 9, 1977, the NLRB affirmed the ALJ in all respects and adopted his recommended order. In footnote 2 to its decision, the NLRB stated as follows:

> "With all due respect for the views expressed by the Court of Appeals for the Third Circuit in its opinion in *Memorial Hospital of Roxborough* v. *N.L.R.B.,* 93 LRRM 2571, 79 LC ¶11,692 (1976), we respectfully adhere to the Board majority's opinion in that case, reported at 220 NLRB No. 73 (1975), until such time as the Supreme Court shall have passed on the matter."

LICH then proceeded to petition the Court of Appeals for review of the NLRB's decision and order and the NLRB cross-petitioned for enforcement. Local 144 subsequently intervened and The American Hospital Association was granted leave to appear *amicus curiae.*

In its decision dated November 17, 1977, the Court of Appeals discussed the majority and dissenting opinions of the Third Circuit in *Roxborough, supra,* but felt that it did not need to choose between the two. Rather, the Court of Appeals concluded that its function was to determine, assuming that comity was a doctrine that could be applied, whether the state decision at issue was precisely congruent with federal policy. After examination of the state and federal statutes involved, the Court of Appeals found that in light of the legislative history of the 1974 amendment to the NLRA, a significant difference in state and federal policy existed sufficient to defeat application of the comity doctrine. Furthermore, the existence of conflicting NLRB decisions on the subject of the appropriateness of hospital maintenance units made the application of comity even more unsuitable.

In considering the proper disposition of the proceeding, the Court of Appeals concluded that the NLRB would have to hold a new election if it found the maintenance unit to be appropriate. However long the presumption of majority status might run in the ordinary case of an NLRB certified election, that presumption would be considered attenuated thirteen years after a state agency conducted election. Hence, the Court of Appeals granted LICH's petition to review to the extent of vacating the NLRB's order, directing it to make its own determination of an appropriate

bargaining unit and thereupon hold a representation election. The cross-petition to enforce the NLRB's order was denied.

Reasons for Granting the Writ

A. *The Decision of the Court of Appeals Enunciates a Test for the Application of the Comity Doctrine Which Conflicts with Tests Applied by Other Circuits.*

The Court of Appeals decision below continually premised its discussion of the propriety of applying the comity doctrine on the assumption that the NLRB might permissibly extend comity to a state agency unit determination in some cases. This assumption, albeit made hesitatingly, creates an immediate conflict in principle with the rationale of the majority opinion of the Third Circuit in *Roxborough, supra.*

The Third Circuit plainly concluded that by granting comity to a state agency unit determination, the NLRB acted outside its authority. The underpinning of this conclusion was the language of Section 9(b) of the NLRA, 29 U.S.C. §159(b), which the Third Circuit quoted as follows:

> "[t]he Board *shall decide in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, *the unit appropriate* for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." [Court's emphasis] (at 360)

The Third Circuit thus interpreted the statute to command the NLRB to exercise its discretion as to an appropriate unit in each and every case. "This responsi-

bility can neither be delegated to nor discharged by a state agency where Congress has sought to create a national labor policy by vesting this discretion in a national board." *Id.*, at 360.

The rationale of the Third Circuit is sharply at odds with the reasoning of the Court of Appeals, which nowhere concludes that the NLRB was forbidden to accept a state agency unit determination. Indeed, rather than summarily rejecting the NLRB's extension of comity to the SLRB unit determination, which the Court of Appeals would seemingly have had to do if it were following the Third Circuit, the Court of Appeals viewed its role as one of exercising great care "to make sure that the state decision at issue was precisely 'congruent with federal policy' ". 96 LRRM at 3124, quoting the last phrase from the *Roxborough* dissent, *supra,* at 363.

Perhaps the conflict in principle between the *Roxborough* decision and the Court of Appeals decision below is best underscored by the latter's reaction to the Third Circuit's majority and dissenting opinions, which was simply as follows:

> "We are not here required to choose between these two able opinions."
>
> (96 LRRM at 3124)

Although the *Roxborough* decision and the Court of Appeals decision below reach somewhat similar results, they are based on differing theories. Furthermore, the two decisions proposed different remedies. Only the Court of Appeals decision below precluded a possible certification based on the state agency conducted election. Instead of resolving the question of comity as it relates to unit determinations, the two decisions engender more uncertainty, which should be rectified by this Court.

There is a further conflict in principle between the Court of Appeals decision and the decision of the Eighth Circuit in *St. Joseph's Hospital* v. *National Labor Relations Board,* 542 F. 2d 495 (8th Cir. 1976), enforcing, 221 NLRB 1253 (1975). By virtue of its memorandum opinion granting enforcement, the Eighth Circuit tacitly approved the NLRB's test for applying comity, which was described as follows:

> ". . . [I]t is not a touchstone of comity that the procedures and policies of a state agency be identical to those of the Board. All that is required is that the state proceedings violate neither due process nor the specific mandates of the Act."
>
> (221 NLRB at 1253)

In contrast, the Court of Appeals erroneously applied a stricter test for extending comity, a test requiring a precise congruency with federal policy. Comity would be rejected not merely in cases of clear conflict between state and federal policy, but also in cases of significant difference in state and federal policy. Thus, the Circuits do not even agree on the criteria for extending comity to state agency determinations.

B. *The Decision of the Court of Appeals, by Applying a Restrictive Test for Extending Comity, Is Contrary to Decisions of the NLRB, Fostering a Lack of Uniformity in the Administration of the NLRA.*

The National Labor Relations Board is charged with the administration of the NLRA. It has recognized the doctrine of comity most recently expressed in *St. Joseph's*

Hospital, supra, in a variety of circumstances. See, e.g. *Cornell University,* 183 NLRB 329 (1970); *Screen Print Corporation,* 151 NLRB 1266 (1965); *The West Indian Co., Ltd.,* 129 NLRB 1203 (1961); *Bluefield Produce & Provision Company,* 117 NLRB 1660 (1957).

In *Roxborough Memorial Hospital, supra,* the NLRB applied the doctrine of comity to a determination of the Pennsylvania Labor Relations Board finding a hospital maintenance unit appropriate. Although the NLRB order was denied enforcement by the Third Circuit, the NLRB's decision and order in this matter states that it declines to follow the holding of the Third Circuit and will continue to adhere to its own ruling in *Roxborough* until the issue is reviewed by this Court.

With the Circuits disagreeing in principle on the propriety of the NLRB granting comity to state agency unit determinations and the NLRB expressing its position that it intends to continue applying the elements of comity as in the past, a significant probability of further uncertainty of the law in this area will continue to exist absent a determination by this Court. Other Circuits may well give considerable weight to the NLRB's interpretation of the NLRA, thereby adding to the list of differing decisions. Cf. *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111 (1944).

The administration of the NLRA, in light of the existence of court review on questions of law, cannot help but be hindered by the lack of uniformly applied principles. Review by this Court is therefore necessary to assure uniformity of decision on a significant issue of federal administrative practice.

C. *The Decision of the Court of Appeals Raises Matters of Recurring Importance Regarding the Application of the 1974 Amendment to the NLRA.*

The coverage of non-profit hospitals under the NLRA by virtue of the 1974 amendment thereto has affected some one and a half million employees. See Sen. Rep. No. 93-766, 93rd Cong., 2d Sess. 3 (1974), 2 [1974] U.S. Cong. & Ad. News 3946, 3948. The wide-ranging effects of the issue involved in this matter prompted The American Hospital Association, comprised of over seven thousand health care institutions, to request and obtain leave to appear as *amicus curiae* before both the Third Circuit in *Roxborough* and the Court of Appeals below.

The American Hospital Association characterized the matter at issue as transcending the interests of the particular parties involved. Petitioner heartily agrees. The NLRA amendment is less than four years old. As discussed herein, several key decisions on the comity issue have already been decided which demonstrate an evident uncertainty over the appropriate treatment of pre-amendment state agency unit determinations. The matter at issue requires a uniform federal policy, one which can be effectuated only by this Court's review of the questions presented.

CONCLUSION

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1978

Appendices

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 99, 100—September Term, 1977.

(Argued September 23, 1977 Decided November 17, 1977.)

Docket Nos. 77-4083, 77-4099

THE LONG ISLAND COLLEGE HOSPITAL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME AND ALLIED SERVICES UNION, SEIU, AFL-CIO,

Respondent-Intervenor.

Before:

FRIENDLY, SMITH and MULLIGAN,

Circuit Judges.

Petition to review and cross-petition to enforce an order of the National Labor Relations Board, 228 NLRB No. 13 (1977), finding that petitioner, the Long Island College

Hospital, had unlawfully refused to bargain with a union certified by the New York State Labor Relations Board as representing its plant maintenance and engineering department employees.

Petition to review granted; petition to enforce denied.

MARTIN D. HEYERT, Esq., New York, N.Y. (Kelley Drye & Warren, Esqs., and Roger J. Karlebach, Esq., of Counsel), *for Petitioner.*

ALLISON W. BROWN, JR., Deputy Assistant General Counsel (John S. Irving, General Counsel; John E. Higgins, Jr., Deputy General Counsel; Carl L. Taylor, Associate General Counsel; Elliott Moore, Deputy Associate General Counsel; Madge F. Jefferson, Attorney, National Labor Relations Board, Washington, D.C., of Counsel), *for Respondent.*

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FRIENDLY, *Circuit Judge*:

This case has a long history; therein lies much of its difficulty. Before us are a petition for review and a cross-petition to enforce an order of the National Labor Relations Board (the NLRB or the Board) finding that Long Island College Hospital (LICH), a non-profit hospital, had violated §§ (8)(a) (5) and (1) of the National Labor Relations Act (NLRA), by refusing to bargain with Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, SEIU, AFL-CIO (the Union). The New York State Labor Relations Board (SLRB), on December 28, 1964, certified the Union as the exclusive collective bargaining representative of

> All full time and regular part time employees in the maintenance of plant and engineering department (excluding chief engineers, assistant chief engineers, maintenance supervisor and clerk) . . . .

See 34 SLRB 324, 336 (1971). The refusal to bargain is conceded. At issue is the propriety of the Board's recognizing the 13-year old certification by the SLRB, rather than making its own unit determination and conducting an election. In pursuing this course the Board expressly declined to follow the decision of a divided panel in *Memorial Hospital of Roxborough* v. *NLRB,* 545 F.2d 351 (3 Cir. 1976), which was rendered after the decision of the Administrative Law Judge (ALJ) in this case.

The Prior Proceedings

The case has its origin in a petition filed by the Union on July 1, 1963, with the SLRB, seeking certification as the exclusive collective bargaining representative for all

of LICH's service and maintenance employees. New York had recently brought non-profit hospitals in cities having a population of a million or more within its labor relations law, 1963 N.Y. Laws ch. 515; at that time such hospitals were excluded from coverage by the NLRA. Another union, the Maintenance Division of the Building and Construction Trades Council (Maintenance Division) sought a unit limited to skilled employees in the maintenance of plant and engineering departments. LICH contended for a single overall unit, excluding only supervisory, professional and confidential employees.

Dealing with the dispute between the Maintenance Division and the Union, which then argued the opposite of the position with respect to the appropriate unit which it was to take later, the SLRB said, 27 SLRB 405, 411 (1964):

> In a number of cases, where no claim of representation had been made for a separate unit of skilled engineering maintenance department employees, we have found a combined service and maintenance unit to be appropriate. But where a separate unit of skilled maintenance employees has been sought, we found weighty considerations both for, and opposed to, the establishment of such a separate unit. Thus, in *Wyckoff Heights Hospital,* 27 SLRB No. 18, we stated:
>
> "On the one hand, they are a homogeneous group of skilled employees having relatively higher earnings and no interchange with the service employees, as well as a history of bargaining in, and Board decisions establishing, separate units of skilled building maintenance employees in non-hospital cases. On the other hand, there is our policy against over-compartmentalization of hospitals into numerous

> small bargaining units, and prior Board decisions (uncontested, to be sure) finding maintenance and service units appropriate in hospitals, as well as some history of bargaining in the hospital industry whereby the maintenance employees have been included in the same unit as the service employees. We find that these factors are equally balanced. Under these circumstances, especially the fact, that the engineer-maintenance employees perform types of services identified with traditional trades and crafts, we believe that the as yet unexpressed desires of these employees should be determinative. Accordingly, as we have done in similar situations, we shall ascertain, by a self-determination election, the desires of the engineer maintenance employees as to whether they prefer to bargain in a separate unit, or in a larger unit including the service employees."
>
> Nothing in the present record warrants a different determination here.

The SLRB directed an election in which service employees were furnished a ballot asking whether or not they desired to be represented by Local 144 but maintenance of plant and engineering department employees were asked to vote on three questions:

1. Do you want a separate bargaining unit limited only to maintenance of plant and engineering department employees? (to be answered "Yes" or "No")
2. If there is a separate unit of maintenance of plant and engineering department employees, do you then

desire to be represented for the purposes of collective bargaining by Maintenance Division, or by Local 144, or by neither?

3. If there is a combined unit of maintenance of plant and engineering department employees and service employees, do you then desire to be represented for the purposes of collective bargaining by Local 144? (to be answered "Yes" or "No")

27 SLRB at 415-16.[1]

Forty-seven out of 55 eligible maintenance employees voted. Twenty-one voted in favor of a separate maintenance unit, five voted against it, one ballot was chal-

[1] The SLRB detailed that its further course would be as follows:

If a majority of the answers to Question "1" are affirmative, we shall find a separate maintenance of plant and engineering department unit to be appropriate, and shall tally the votes of these employees on Question "2", disregarding Question "3". In that event, we shall also find a separate unit of service employees to be appropriate, and shall tally the votes of the service employees in that unit.

On the other hand, if a majority of these voters do not answer Question "1" affirmatively, we shall then find a combined unit of service employees and maintenance of plant and engineering department employees to be appropriate. In that event, we shall mingle the ballots of the maintenance of plant and engineering department employees with the ballots of the service employees, tallying the votes of the plant and engineering department employees on Question "3", and the votes of the service employees.[25] Only one overall total will be given, and we shall not separately report the results of the service and of the maintenance of plant and engineering department employees.

27 SLRB at 416. While the SLRB procedure obviously had the effect of denying the service employees any vote on whether *they* preferred one unit or two, this would also be true under the somewhat different procedures long followed by the NLRB in similar cases, see *Globe Machine and Stamping Co.*, 3 NLRB 294, 300 (1937); *Court Square Press, Inc.*, 151 NLRB 861, 865-66 (1965).

lenged and 20 ballots were left blank. On the second question, 24 employees voted for the Union, four voted for the Maintenance Division, 16 voted "neither", two voters left the question blank and one was challenged. The service employees voted 151-309 against the Union. Over objections by LICH unnecessary here to detail, the SLRB on December 28, 1964, certified the Union as the representative of the maintenance and engineering employees.

When LICH refused to bargain, the Union, instead of filing an unfair labor practice charge under the New York Labor Relations Act, invoked a section of that statute providing for mediation, fact-finding and arbitration of disputes between non-profit hospitals and unions. LICH sought to enjoin this action as an improper remedy and finally prevailed, *Long Island College Hospital* v. *Catherwood,* 23 N.Y.2d 20, 294 N.Y.S.2d 697 (1968), *appeal dismissed,* 394 U.S. 716 (1969). Some six months after the decision of the New York Court of Appeals the Union filed an unfair labor practi e charge before the SLRB. A hearing was held in which LICH contested both the appropriate bargaining unit and the conduct of the election. The SLRB ruled against LICH and was ultimately sustained, *Long Island College Hospital* v. *New York SLRB,* 32 N.Y. 2d 314, 345 N.Y.S.2d 449 (1973), *cert. denied,* 415 U.S. 957 (1974).

LICH thereupon entered into negotiations with the Union, although persisting in its contention that the unit was inappropriate. In August 1975 it discontinued negotiations on that ground. Meanwhile, on August 25, 1974, the NLRA had been amended to include non-profit hospitals, Public Law 93-360, 88 Stat. 395. The Union then filed a refusal to bargain charge with the Regional Director of the NLRB, who issued a complaint. An ALJ con-

ducted a hearing where extensive evidence was taken with regard to existing conditions relevant to the appropriateness of a bargaining unit limited to maintenance and engineering employees and excluding service employees.

Stating that "[t]he principal issue herein is the effect to be given" to the SLRB certification, the ALJ ruled that the certificate should be honored. He quoted the NLRB's statement in the *Memorial Hospital of Roxborough* case, *supra,* 220 NLRB at 403 (1975), that it "will recognize the results of an election conducted by a responsible state agency, and therefore extend comity to a certification issued pursuant to such an election, where the state agency's election procedures conform to due process requirements and effectuate the policies of the Act." After reviewing LICH's contentions, he found these conditions to have been satisfied, held that LICH had violated §§ 8(a)(5) and (1), and recommended a bargaining order and a broad cease and desist order. LICH having filed exceptions, a three member panel of the NLRB, declining to follow the Third Circuit's intervening ruling in the *Roxborough Hospital* case, *supra,* 545 F.2d 351, adopted the ALJ's recommendations, 228 NLRB No. 13 (1977). LICH petitioned for review and the NLRB has cross-petitioned for enforcement.

The Legislative History of the 1974 Amendment

Before proceeding further, it will be useful to set out relevant portions of the legislative history of the 1974 amendment bringing non-profit hospitals within the coverage of the NLRA. The amendment stemmed from a belief that, as stated in the Senate Report, there was "no acceptable reason why 1,427,012 employees of . . . non-profit, non-public hospitals, representing 56% of all hospital employees, should continue to be excluded from the coverage and protections of the Act." Sen. Rep. No. 93-766, 93d Cong., 2d Sess. 3 (1974), 2 [1974] U.S. Code Cong. & Ad. News 3946, 3948, Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974 at 10 [hereinafter Legis. Hist.] The report continued in language that had also been contained in the House Report under the heading "Bargaining Units":

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center,* 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital,* 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia,* 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]

Id. at 5, U.S. Code Cong. & Ad. News at 3950, Legis. Hist., *supra,* at 12; H.R. Rep. 93-1051, 93d Cong., 2d Sess. 6-7 (1974), Legis. Hist., *supra,* at 274-75.

Senator Williams, chairman of the Senate Committee that had drafted the amendment elaborated upon this on the Senate floor:

> . . . The National Labor Relations Board has shown good judgment in establishing appropriate units for the purposes of collective bargaining, particularly in

[1] By our reference to *Extendicare,* we do not necessarily approve all of the holdings of that decision.

wrestling with units [in] newly covered industries. While the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, particularly where there is such a history in the area or a notable disparity of interests between employees in different job classifications.

While the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargaining units. (*NLRB* v. *Delaware-New Jersey Ferry Co.*, 128 F.2d 130 (3d Cir. 1942)).

120 Cong. Rec. S. 12104 (July 10, 1974); Legis. Hist., *supra*, at 363.[2] Senator Taft, who had introduced a bill, S. 2292, that would have limited the NLRB to designating only four appropriate units in health care institutions, to wit, units of professional employees, technical employees, clerical employees, and service and maintenance employees, stated in accepting the Committee's compromise:

> "I believe this is a sound approach and a constructive compromise, as the Board should be permitted some flexibility in unit determination cases. I can-

[2] The "extension" section of the Congressional Record for July 22, subsequent to adoption of the Conference Report by the House, reports a similar statement as part of a "Speech of Honorable Frank Thompson in the House of Representatives, July 11, 1974." 120 Cong. Rec. E4899.

not stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented.

"The administrative problems from a practical operational viewpoint and labor relation viewpoint must be considered by the Board on this issue. Health-care institutions must not be permitted to go the route of other industries, particularly the construction trades, in this regard.

"In analyzing the issue of bargaining units, the Board should also consider the issue of the cost of medical care. Undue unit proliferation must not be permitted to create wage 'leapfrogging' and 'whipsawing'. The cost of medical care in this country has already skyrocketed, and costs must be maintained at a reasonable level to permit adequate health care for Americans from all economic sectors."

120 Cong. Rec. S6940-41 (May 2, 1974), Legis. Hist., *supra*, at 114.

A final relevant bit of legislative history is the rejection by both houses of Congress of amendments that would have preserved certain state labor laws from preemption by the new national law. 120 Cong. Rec. S6991 (May 2, 1973) (Senator Mondale); 120 Cong. Rec. H4597-99 (May 30, 1974) (Representative Quie), Legis. Hist., *supra*, at 315-22. Opponents of these amendments stressed the need for a national approach and the problems of having collective bargaining in different states governed by different laws. See 120 Cong. Rec. H4598 (May 30, 1974), Legis. Hist.,

supra, at 317 (Congressman Thompson); 120 Cong. Rec. S6942 (May 2, 1974), Legis. Hist., *supra,* at 117-18 (Senator Taft). When the Conference Report was being debated, Representative Quie of Minnesota, one of the House managers who had sponsored the non-preemption amendment which the House had defeated, engaged in the following discussion with Representative Thompson of New Jersey, also a manager on the part of the House:

> "Mr. Quie. . . . [W]hat is the application of the legislation on hospitals and unions presently engaged in bargaining under State laws, or even where no law, State or Federal, had previously applied to them?
>
> "Mr. Thompson of New Jersey. To attempt to answer your questions, it seems that those hospitals presently engaged in bargaining will have to meet the requirements of the National Labor Relations Act when this legislation becomes effective. For instance, had a hospital recognized a minority union, it is contemplated that the hospital could no longer continue recognition. *It would seem the better practice that if either party questioned the validity of the recognition or the appropriate unit, they should file a representation petition with the NLRB.*"

120 Cong. Rec. H6393 (July 11, 1974), Legis. Hist., *supra,* at 388 (emphasis added). It should be noted, however, that while Congress rejected a special cession of jurisdiction amendment applicable to non-profit hospitals, there was recognition that §10(a) of the NLRA would continue to apply. As Representative Thompson stated in response to a further question from Representative Quie:

> The NLRA in section 10(a) empowers the Board to cede to any State agency jurisdiction over cases in any industry unless the Board determines the state statute is inconsistent with the corresponding provision of the NLRA. . . . As a matter of fact, I would urge the Board . . . to exercise its authority . . . to cede jurisdiction to the respective State agencies . . . over disputes involving non-profit hospital employees if it determines that a State law is substantially equivalent to the Federal law. . . ." *Id.* See also 120 Cong. Rec. S6943 (May 2, 1974), Legis. Hist., *supra,* at 117 (exchange between Senators Mondale and Taft).

Discussion

Our discussion naturally begins with the Third Circuit's decision in *Memorial Hospital of Roxborough* v. *NLRB,* 545 F.2d 351. Judge Garth's opinion for the majority, consisting of Judge Aldisert and himself, starts off from the language of §9(b) of the NLRA:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [this Act], the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .

He proceeds to summarize the law on judicial review of NLRB unit determination, to wit, that such a determination "involves of necessity a large measure of discretion and the decision of the Board, if not final, is rarely to be disturbed," *Packard Motor Car Co.* v. *NLRB,* 330 U.S. 458, 491 (1947). However, "[w]hen the Board so exercises the discretion given to it by Congress, it must 'disclose the basis

of its order' and 'give clear indication that it has exercised the discretion with which Congress empowered it,'" *NLRB* v. *Metropolitan Life Ins. Co.,* 380 U.S. 438, 443 (1965), *quoting Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 197 (1941), and it remains for the courts to insure that the exercise of the Board's discretion is not "so unreasonable and arbitrary as to exceed the Board's power," *Packard Motor Car Co.* v. *NLRB, supra,* 330 U.S. at 491. See *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 157, 171-72 (1971).

Judge Garth concluded that, in view of the language of § 9(b) and these and other Supreme Court decisions, the Board could not lawfully abdicate to a state agency the exercise of its discretion as to the appropriate unit. He distinguished the three Board cases which the NLRB had cited in support of its application of comity in its *Roxborough* decision and upon which the ALJ in the instant case relied, as having involved, not the recognition of a state board's determination of an appropriate unit but rather of state conducted elections where the parties did not dispute the appropriateness of the unit.[3] Section 9(a),

[3] The cases are *Bluefield Produce & Provision Co.,* 117 NLRB 1660 (1957); *West Indian Co.,* 129 NLRB 1203 (1961); *Screen Print Corp.,* 151 NLRB 1266 (1965). Our only caveat relates to *West Indian Co., supra,* 129 NLRB 1203, where the dissent stated that "in this case the appellant contends . . . that the unit was arbitrarily determined." 129 NLRB at 1204. However, there is no elaboration of what aspect of the determination was allegedly arbitrary. Moreover, there apparently was no unit appropriateness dispute in the original state election and the majority opinion mentions no such dispute before the NLRB.

The distinction drawn by Judge Garth is equally applicable to another case cited by the Board in *Roxborough, Cornell University,* 185 NLRB 329, 334 (1970) where unit appropriateness was "virtually" stipulated to by the parties and also applies to the two cases relied upon in *Bluefield* itself, *Olin Mathieson Chemical Corp.,*

Judge Garth pointed out, does not require a Board supervised election in order to determine majority status; it speaks rather of "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes. . . ." As state-supervised elections provide one mechanism for such designation or selection, extending comity to a state-supervised *election* would not be inconsistent with the NLRA. In Judge Garth's view, however, the language of § 9(b) required a different result for the issue of unit appropriateness. After again quoting that section's language, he concluded, 545 F.2d at 360:

> Thus the statute requires the Board to exercise its discretion as to an appropriate unit in each and every case. This responsibility can neither be delegated to nor discharged by a state agency where Congress has sought to create a national labor policy by vesting this discretion in a national board. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U.S. 18, 24-27, 69 S.Ct. 379, 93 L.Ed. 463 (1948). Here, however, the Board abdicated its required duty by

115 NLRB 1501 (1956) and *T-H Products Co.,* 113 NLRB 1246 (1955). Thus, the only NLRB decisions which do appear to involve the application of comity in disputed unit appropriateness cases occurred after the Board's opinion in *Roxborough: St. Joseph's Hospital,* 221 NLRB 1253 (1975) and *Mercy-Memorial Hospital Corp.,* 221 NLRB 1 (1975), *enforcement pending, NLRB* v. *Mercy-Memorial Hospital Corp.* (6 Cir.) (No. 76-2338). Finally, none of the court cases cited to us by the Board approved use of comity in a disputed unit appropriateness case. See *Western Meat Packing Co.,* 350 F.2d 804 (10 Cir. 1965); *Intalco Aluminum Corp.* v. *NLRB,* 417 F.2d 36, 40 (9 Cir. 1969); *NLRB* v. *St. Luke's Hospital Center,* 551 F.2d 476 (2 Cir. 1976) (affirming an NLRB decision *not* to recognize a state-certified unit on grounds of comity); *Getreu* v. *Bartenders & Hotel & Restaurant Employees Union,* 181 F.Supp. 738, 741 (N.D. Ind. 1960); *Methodist Hospital Corp.* v. *New York SLRB,* 382 F. Supp. 459 (SDNY 1974).

> accepting the PLRB determination without exercising its own mandated discretion. In so doing the Board "overstep[ped] the law." *Packard Motor Car Co.* v. *NLRB, supra,* 330 U.S. at 491, 67 S.Ct. 789.

Further support for this conclusion was found in the legislative history of the 1974 amendments to which we have referred.

Chief Judge Seitz dissented. Conceding that the unit determination must be made by the NLRB, he did not think the statute "necessarily preclude(s) the Board from relying on other processes of law, as long as it can assert a sound policy for doing so." In *Roxborough,* "[b]efore according comity, it reviewed the PLRB [Pennsylvania Labor Relations Board] proceedings and satisfied itself that they were in accord with due process standards and the policies embodied in the NLRA." In his view, when "[f]aced with the need to implement a national policy in an area hitherto left to state regulation, the Board could reasonably conclude that according comity to those state labor board decisions which are congruent with federal policy would best serve the purposes of the NLRA," 545 F.2d at 362-63.

We are not here required to choose between these two able opinions. Even if it were to be assumed, for purposes of argument only, that we might take the dissent's view that the NLRB may sometimes apply "comity" to state unit determinations, great care must be exercised to make sure that the state decision at issue was precisely "congruent with federal policy." 545 F.2d at 363. There was insufficient basis for so concluding here.

Neither the NLRB nor the Union suggests that the Board was required by principles of *res judicata* to respect

the 1964 certification of the SLRB. Any such contention would fly in the face of the language of § 9(b). Rather the Board and the Union contend that the Board was authorized, as a matter of "comity," to treat the SLRB's 1964 determination of an appropriate unit and consequent certification of the Union as if these had been its own.

"Comity" is a notion of highly uncertain content. The Board refers us to the statement in *Mast, Foos & Co.* v. *Stover Mfg. Co.,* 177 U.S. 485, 488-89 (1900), that

> Comity is not a rule of law, but one of practice, convenience and expediency . . . (which) has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question . . . its obligation is not imperative . . . . Comity persuades; but it does not command. It declares not how a case shall be decided but how it may with propriety be decided.

The statement, however, was made in a far different context, namely, the extent to which one federal court of appeals should feel itself bound by the decision of another with respect to the validity and scope of a patent. Both courts were governed by the same law and the statement was made in deprecating the appellant's claim that the second court of appeals had given insufficient weight to "comity". More enlightening for this case, although not dispositive, is this court's recent statement in *NLRB* v. *St. Luke's Hospital,* 551 F.2d 476 (1976). There we upheld a finding that an employer had engaged in an unfair labor practice by enforcing the union security clause in a collective bargaining agreement with a union certified by the SLRB to represent a unit which could not have been approved by the NLRB because of the "professional" proviso

in § 9(b)(1). Rejecting the employer's claim to comity, Chief Judge Kaufman said, *id.* at 482 (citations omitted):

> Arrangements resulting from state agency proceedings should generally be respected if consistent with federal policies. "Comity" in this sense reflects the desirability of supporting settled relationships in the absence of compelling countervailing reasons. It is clear, however, that the NLRB is not required to defer to state proceedings where federal policy would be undermined.

We would strengthen the last sentence to say "is not required or permitted." Moreover, at least with the background afforded by the legislative history of the 1974 amendments bringing non-profit hospitals within the NLRB's jurisdiction, a significant difference in state and federal policy, even though falling short of the clear conflict present in the *St. Luke's Hospital* case, should suffice to defeat application of the "comity" doctrine to a state unit determination. Cf. *NLRB* v. *Committee of Interns and Residents,* Docket No. 77-6075, slip opinions 6077, 6088-89 (2 Cir. Sept. 21, 1977). It is not enough that, as said by the ALJ, the state and federal statutes "are not inimical"—a view echoing the Board's earlier statement in *St. Joseph's Hospital,* 221 NLRB 1253 (1975):

> it is not a touchstone of comity that the procedures and policies of a state agency be identical to those of the Board. All that is required is that the state proceedings violate neither due process nor the specific mandates of the Act.

On their face § 705(2) of the New York Labor Relations Act and § 9(b) of the NLRA are significantly different. Section 705(2) provides:

> 2. The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; *provided, however, that in any case where the majority of employees of a particular craft, or in the case of a non-profitmaking hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining.* (emphasis added).

The proviso, which gives the majority of a craft an absolute right to mandate the craft's designation as an appropriate unit is by no means the same as the second proviso to § 9(b), that the Board shall not

> (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation . . . .

On the facts of this case the majority of any craft at LICH could have compelled the SLRB to designate it as an appropriate unit; no such compulsion could have been exercised on the NLRB under the second proviso to § 9(b) if it had decided to act on its own after it had acquired jurisdiction. Moreover, such *compulsion* to establish craft units runs counter to the 1974 legislative history stressing the dangers of overcompartmentalization in the health care industry.

The Board and the Union contend that despite the facial differences which they ignore or deprecate, these were of no moment in the instant case. No group of LICH's maintenance and engineering employees actually alleged craft status under the proviso in § 705(2) of the New York Act. Moreover, to show an identity of policy, we are pointed to the statement of the SLRB, quoted above, enunciating a policy "against overcompartmentalization of hospitals into small bargaining units," *Long Island College Hospital, supra,* 27 SLRB 405, 411, *quoting Wyckoff Heights Hospital,* 27 SLRB 75, 82 (1964), and to the following extract from the opinion of the New York Court of Appeals, 32 N.Y.2d at 32 N.Y.S.2d at 455 (citations omitted):

> Without merit is the hospital's argument that the unit selected may improperly fragment the hospital into numerous small units. Not only does the statute not preclude "fragmentation" but it declares that, in establishing an appropriate unit, the guide is that the board "insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise * * * effectuate the policies of this article" (Labor Law, § 705, subd. 2). This is accomplished at times by establishing a small bargaining unit limited to those employees who constitute a homogeneous group and desire the benefits of collective bargaining. . . . Actually, the board's practice in allowing skilled maintenance employees in hospitals to form a separate bargaining unit if they wish to do so, far from constituting overcompartmentalization, has avoided more serious fragmentation into numerous smaller units since, under the mandatory craft unit provision of subdivision 2 of section 705, each skilled craft, such as

> plumbers, painters and carpenters, could have demanded and could have been included in a separate unit.

These statements do show that the SLRB gave weight to the policy "against overcompartmentalization". But they show also that the SLRB decided as it did in light of the fact—indeed "especially the fact"—that in its view "the engineer-maintenance employees perform types of services identified with the traditional trades and crafts," 27 SLRB at 411; see also *id.* at 410, whose desires, if expressed, could have forced the SLRB into still further compartmentalization. This is particularly the thrust of the last sentence of the extract from the opinion of the New York Court of Appeals. In contrast the NLRB, in making an initial unit determination for LICH, would not have had to be worried about demands of a majority of a craft for designation of the craft as a separate unit; it would have been able to make its own determination, free from any such concern.

Counsel for the Board argues that, despite the lack of any such compulsion as stems from the proviso to the New York statute, the NLRB could have reached the same result, both on the evidence before the SLRB and that before the ALJ, as the SLRB did here. But neither counsel nor the Board said it *would* have reached that result, for the excellent reason that no one really knows how the Board would decide any case in this area of the law. In the fifteen post-amendment non-profit hospital cases cited to us, the Board rejected maintenance-only units (as opposed to larger maintenance and service units) eleven times (*Shriners Hospital,* 217 NLRB 806 (1975); *Metropolitan Hospital,* 223 NLRB 282 (1976); *Jewish Hospital Association of Cincinnati,* 223 NLRB 614 (1976); *Riverside Meth-*

odist Hospital, 223 NLRB 1084 (1976); *Baptist Memorial Hospital,* 224 NLRB 199 (1976); *St. Joseph's Hospital,* 224 NLRB 270 (1976); *Greater Bakersfield Memorial Hospital,* 226 NLRB No. 143 (1976); *Sutter Community Hospitals of Sacramento, Inc.,* 227 NLRB No. 18 (1976); *Anaheim Memorial Hospital Association,* 227 NLRB No. 25 (1976); *Northeastern Hospital,* 230 NLRB No. 162 (1977); *Peter Bent Brigham Hospital,* 231 NLRB No. 132 (1977)), and approved them only four times (*Sinai Hospital of Detroit, Inc.,* 226 NLRB No. 61 (1976); *Eskaton American River Health Care Center,* 225 NLRB 755 (1976); *West Surburban Hospital,* 224 NLRB 1349 (1976); *St. Francis Hospital Medical Center,* 223 NLRB 1451 (1976)). See also *Hebrew Rehabilitation Center for the Aged,* 230 NLRB No. 35 (1977) (approving maintenance only unit, rather than maintenance and service unit, in a "health care institution operating as a center for the care of aged people.") However, the picture is not so favorable to LICH as these raw figures would indicate.

With commendable candor, counsel for the NLRB explained to us that there had been a serious difference of opinion among Board members on the question of certifying hospital maintenance and engineering units without service employees. Agreement does exist on such generalities as that

> Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board the authority to define bargaining units and indicates that the Board's purpose in making unit determinations should be "to assure to employees the fullest freedom in exercising the rights guaranteed by [the National Labor Relations Act]."

Barnert Memorial Hospital Center, 217 NLRB 775, 776 (1975), and that

> As we have recognized and continue to recognize, our consideration of the issues related to the composition of bargaining units in the health care industry must necessarily take place against the background of avoidance of undue proliferation. However, Congress left the . . . matter of the determination of appropriate units to the Board, and the desire for nonproliferation does not, in our judgment, necessarily preclude our granting maintenance units in the health care area. Congress was aware that the Board has sometimes found that a separate maintenance unit is appropriate if the maintenance employees possess a community of interest sufficiently separate and distinct . . . to warrant . . . a separate unit. Yet, it did nothing to preclude our granting such units. Congress in fact rejected Senator Taft's suggestion that maintenance employees should always be combined with service employees into a single unit.

Jewish Hospital of Cincinnati, supra, 223 NLRB at 616.[4] See *Riverside Methodist Hospital, supra,* 223 NLRB 1084;

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[4] We agree with this conclusion. Moreover, the preamendment NLRB health care cases cited favorably in the legislative history of the 1974 amendment do not call for a different result. Two of the three cases are not determinative of the skilled maintenance unit issue, as they involved NLRB rejection of seven narrower units than those at issue here. See *Woodland Park Hospital,* 205 NLRB 888 (1973) (X-Ray technicians); *Four Seasons Nursing Center,* 208 NLRB 403 (1974) (2-man unskilled maintenance unit). In the third case, *Extendicare of West Virginia, Inc.,* 203 NLRB 1232 (1973), the union sought three separate units—for licensed practical nurses (LPN's), technical employees, and service and maintenance employees. The employer contended that the only appropriate unit was a single all-employee unit. The NLRB ap-

Sinai Hospital of Detroit, supra, 226 NLRB No. 61. There is agreement also that in determining the existence of a "sufficiently separate and distinct" community of interest, the Board will look to "such factors as mutuality of interest in wages and hours, commonality of supervision, skills and functions, infrequency of contact with other employees, lack of interchange and functional integration, and area practice and pattern of bargaining." *Eskaton American River Healthcare Center, supra,* 225 NLRB at 756. However, there have been wide differences of opinion as to what several of these phrases mean in the particular context created by Congress' expressions against proliferation of units in the health care industry. Members Penello and Walther were of the view that in such cases a more rigid standard than that applied in other industries should govern the appropriateness of separate maintenance units in hospitals, one that

> can be met when the unit sought . . . is composed of licensed craftsmen engaged in traditional craft work, which is performed in a separate and distinct location apart from other employees in the health care unit.

St. Vincent's Hospital, 223 NLRB 638, 639 (1976). In contrast, Members Fanning and Murphy appear to require little more than the separate community of interest showing found sufficient in other contexts. See, e.g., *Riverside Methodist Hospital,* 223 NLRB 1084, 1087 (1976). In addition to the differences over the content of these legal concepts the cited opinions demonstrate that Board members draw widely divergent factual conclusions in the same cases.

proved 1) a separate LPN unit, and 2) a service and maintenance unit including technicals but excluding office clericals. As the issue of a separate maintenance-only unit was not before the Board, *Extendicare* did not raise the same issue as the instant case. Moreover, while the legislative history clearly approved *Woodland Park* and *Four Seasons,* its reference to *Extendicare* was obscure at best: "We do not necessarily approve all of the holdings of that decision." Sen. Rep. No. 93-766, 93d Cong., 2d Sess. 5 (1974), Legis. Hist., *supra,* at 12; H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 6-7 (1974), Legis. Hist., *supra,* at 274-75.

With its own opinions in such disarray, it was peculiarly inappropriate for the Board to avoid a decision here by deferring to the dated certification of a state agency when there was at least some risk that the difference in the state statute might have affected the state agency's ruling—even if we were to assume, contrary to the majority opinion in *Roxborough, supra,* 545 F.2d 351, that in some cases this might be permissible. As said in *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U.S. 18, 26 (1949):

> A certification by a state board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision.

We add as a makeweight that insofar as one of the justifications for "comity" is judicial or administrative economy, it served little purpose here, where the ALJ felt compelled to conduct a hearing on existing conditions at LICH substantially as extensive as would have been held on a new petition for certification under 29 C.F.R. §§ 102.63 and .64.[5]

[5] We do not think it profitable to engage in lengthy discussion of decisions, notably *Raley's Supermarkets,* 143 NLRB 256 (1963), where the Board has "deferred" to the awards of arbitrators in "accretion" cases. See *NLRB* v. *Horn & Hardart Co.,* 439 F.2d 674, 679 (2 Cir. 1971). The Board seems to have become rather disenchanted with *Raley's.* See, e.g., *Woolwich, Inc.,* 185 NLRB 783 (1970); *Patterson-Sargent Division of Textron, Inc.,* 173 NLRB 1290 (1968); *Beacon Photo Service, Inc.,* 163 NLRB 706

There remains a question concerning the proper disposition of this proceeding. The *Roxborough* court remanded the case to the Board, 545 F.2d at 362. It recognized, as we do, that "the Board may, in the proper exercise of its discretion, reach the same result" as the state agency had done. It seemed to assume, however, that if the Board also made sufficient findings, either by scrutiny of the record before the state agency or by its own inquiry, that the hospital's objections to the conduct of the election were unfounded, the Board might, without more, issue an order holding that the hospital had unfairly refused to bargain. The question is whether, if the Board should find the separate bargaining unit to be appropriate, a new election must be held or the Board may rely on the results of the election held in 1964 should it conclude that LICH's objections to that election are without merit.

If the facts here were similar to those in *Roxborough*, we might well follow the course taken in that case. There the election was held in the fall of 1973, the court's decision was rendered only some three years later, and there would be good reason to believe that a union that had obtained a majority three years earlier was still the representative

(1967); *Combustion Engineering Inc.*, 195 NLRB 909 (1972); and particularly *Hershey Foods Corp.*, 208 NLRB 452, *enforced memorandum* (3 Cir. 1974) (not reported officially), where the Board affirmed the rulings of its ALJ, who had noted that the *Raley's* case "preceded the line of cases cited above in which the Board had declined to defer to arbitral awards where accretion is in issue. The later cases must thus be deemed to supersede *Raley's* . . . if regarded as inconsistent therewith." *Id.* at 457. Although the Supreme Court noted *Raley's* with apparent approval in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270 n.1 (1964), it made clear that the deference to arbitration in unit cases was not to be a blind one, 375 U.S. at 272; and ultimately the Board declined to defer to the arbitrator's findings in that very case, *Westinghouse Electric Corp.*, 162 NLRB 768 (1967).

"designated or selected by the majority of the employees in a unit appropriate for such purposes," § 9(a). Here the interval is 13 years and only 8 of the 55 employees who were in the unit in 1963 are still members of the present unit of 69. This is particularly significant as the *SLRB's* original certification was explicitly granted only "for the period of one year . . . from the completion of . . . judicial review. . . ." of that order, a period which has already passed. 34 SLRB 324, 337. We are well aware of the decisions that even after the expiration of the one year during which an *NLRB* certification is conclusive, the union retains a rebuttable presumption of majority status, e.g., *NLRB* v. *Frick Co.*, 423 F.2d 1327, 1330 (3 Cir. 1970); *Terrell Machine Co.* v. *NLRB*, 427 F.2d 1088, 1090 (4 Cir. 1970), *cert. denied*, 398 U.S. 929; *N.L.R.B.* v. *Washington Manor, Inc.*, 519 F.2d 750, 751 (6 Cir. 1975). But here we have held that the NLRB was not justified in accepting the SLRB's certification as its own but must make its own determination of an appropriate unit on the basis of existing employment conditions. However long the majority presumption may run in the ordinary case of a Board-certified election, that presumption must be considered attenuated thirteen years after an election not run under Board auspices. It would seem wholly inconsistent with the mandate of § 9(b) "to assure to employees the fullest freedom in exercising the rights guaranteed" by the NLRB for the Board to deprive them of an election because of the vote taken by a New York Board in 1964. If the Union in fact enjoys the degree of support claimed at argument, it should have no hesitation in submitting to the polls.

The cross-petition to enforce is denied; the petition to review is granted to the extent of vacating the Board's

order, directing it to make its own determination of an appropriate bargaining unit on the evidence adduced before the ALJ and such further evidence, if any, as it deems appropriate, and thereupon to hold a representation election.

APPENDIX B

Decision and Order of the National Labor Relations Board

MFJ
228 NLRB No. 13 D-2137
New York, N. Y.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 29—CA—4562

THE LONG ISLAND COLLEGE HOSPITAL,

—and—

LOCAL 144, HOTEL, HOSPITAL NURSING HOME AND ALLIED SERVICES UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO.

DECISION AND ORDER

On June 4, 1976, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief[1] and has decided to affirm the rulings, findings, and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, The Long Island College Hospital, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. February 9, 1977

.....

Betty Southard Murphy, Chairman

.....

John H. Fanning, Member

.....

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1] Respondent's request for oral argument is hereby denied, inasmuch as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

[2] With all due respect for the views expressed by the Court of Appeals for the Third Circuit in its opinion in *Memorial Hospital of Roxborough* v. *N.L.R.B.*, 93 LRRM 2571, 79 LC ¶ 11,692 (1976), we respectfully adhere to the Board majority's opinion in that case, reported at 220 NLRB No. 73 (1975), until such time as the Supreme Court shall have passed on the matter.

JD-355-76
Brooklyn, NY

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

Case No. 29-CA-4562

THE LONG ISLAND COLLEGE HOSPITAL

and

LOCAL 144, HOTEL, HOSPITAL NURSING HOME AND ALLIED SERVICES UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

JOEL H. FRIEDMAN, ESQ., of Brooklyn, NY,
for the General Counsel.

KELLEY, DRYE & WARREN, New York, NY,
by MARTIN D. HEYERT, ESQ., and
ROGER J. KARLEBACH, ESQ.,
for the Respondent.

VLADECK, ELIAS, VLADECK & LEWIS, of New York, NY,
by THOMAS KILHENNY, ESQ.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: A hearing in this matter was held before me in Brooklyn, New York, on March 9 and 10, 1976 based upon a charge filed

by Local 144, Hotel, Hospital Nursing Home and Allied Services Union, Service Employees International Union, AFL-CIO, herein the Union, on September 8, 1975, and a complaint issued by the Regional Director of Region 29 of the National Labor Relations Board on December 31, 1975. The complaint alleged that the Long Island College Hospital, herein Respondent, has refused to meet or bargain with the Union in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, herein the Act. Respondent timely filed an answer to the complaint, admitting certain facts, denying the commission of the alleged unfair labor practices and setting forth its affirmative defenses. Briefs have been filed by General Counsel, Respondent and the Union.

Based upon the entire record in this case,[1] including the briefs and oral arguments of counsel and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Respondent's Business

Respondent, a New York corporation, is engaged in the operation of a not-for-profit hospital, providing hospital, health care and related services in New York, New York. The complaint alleged and Respondent admitted that during the past year, a representative period, Respondent derived in excess of $250,000 in gross revenues from its operations and purchased and caused to be transported to its New York location goods and materials valued in excess of $50,000, in interstate commerce, directly from

[1] Respondent's unopposed motion to correct the transcript is granted.

States of the United States other than the State of New York. The complaint alleged, Respondent admitted, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Union's Labor Organization Status

The complaint alleged, Respondent admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Issues and Chronology of Events*[2]

The principal issue herein is the effect to be given to a Certification of Representative issued by the New York State Labor Relations Board, herein the SLRB. That certification issued in 1964, but because of protracted litigation, resulted in little collective bargaining and did not bring to fruition a contractualized collective-bargaining relationship. Respondent's affirmative defenses questioned the effect on the continuance of the bargaining obligation of changes in Respondent's location, operations and unit composition.

On December 28, 1964, the SLRB certified the Union as the exclusive collective-bargaining representative of Respondent's employees in the following unit:[3]

[2] The facts as set forth in this Chronology are not in dispute. They are based upon admissions, stipulations and reported administrative agency and court decisions of which I have taken judicial notice, pursuant to the requests of the parties.

[3] The election upon which the certification was based had been conducted on July 22, 1964 upon an SLRB Direction of Election which had issued July 6, 1964 (27 N.Y. SLRB 405). The ballot

> All full-time and regular part-time employees in the maintenance of plant and engineering department, excluding chief engineers, assistant chief engineers, clerk and maintenance supervisor, [and all supervisors as defined in Section 2(11) of the Act.]

Respondent refused to bargain with the Union, contending, *inter alia,* that the unit was inappropriate.

At this point, as it was subsequently determined, the Union chose an inappropriate avenue of review. It invoked Section 716 of the State Labor Relations Act, which provided for mediation, fact-finding and binding arbitration of "disputes" between nonprofitmaking hospitals and unions. The State Industrial Commissioner appointed a fact-finding commission and, when that commission's recommendations were rejected by Respondent, sent the controversy to arbitration before the New York State Board of Mediation. Respondent sought to enjoin both the fact-finding and the arbitration.

On November 7, 1968, the New York Court of Appeals, in *College Hospital* v. *Catherwood,* 23 N.Y. 2d 20, 69 LRRM 2605 (hereinafter referred to as *College Hospital,* No. I) upheld Respondent's contention that resort to Section 716 was inappropriate, concluding the "disputes" as defined in that section did not include representation issues. The Union, it found, should have followed "the traditional pro-

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afforded the employees in this unit the following choices for self-determination: separate unit status, representation by the Union in such a separate unit, or, if no separate unit was selected, representation by the Union in an overall service employee unit. The employees chose union representation in the separate unit. In a unit of approximately 55 employees, 44 employees cast valid ballots. The Union receives a majority—24. The employees in the larger service unit, voting on the same day, rejected representation.

cedure by filing an unfair labor practice charge under Section 704(6) [State Labor Relations Act] against the hospital for its refusal to bargain collectively with the representatives of the employees—a procedure which . . . would have enabled the hospital judicially to challenge the finding of an unfair labor practice as well as the Labor Board's certification of the union as exclusive representative for maintenance employees." The Union's appeal from this decision was dismissed. *Ottley et al., of Local 144, Hospital & Allied Service Employees International Union, AFL-CIO* v. *Long Island College Hospital,* 394 U.S. 716, 70 LRRM 3378 (1969).

Respondent, on May 13, 1969, moved before the SLRB to vacate the certification as stale and unenforceable due to the passage of time and changes in the composition of the unit. The SLRB denied the motion.

In accord with the decision of the New York Court of Appeals, the Union, on May 7, 1969, filed its unfair labor practice charge against Respondent, alleging a refusal to bargain under the State Labor Relations Act, Section 704(6). A complaint issued. As subsequently and succinctly related by the New York Court of Appeals (*College Hospital* v. *N.Y. Labor Board,* 32 N.Y. 2d 314, 85 LRRM 2580 (1973) hereinafter referred to as *College Hospital* No. II):

> At the [SLRB] hearing which followed, the hospital not only attacked the board's original certification order of 1964, determining that the skilled maintenance workers constituted an appropriate bargaining unit, but interposed new matters concerning, among other things, alleged improprieties in the conduct of the election. After thorough consideration of these issues, the board adhered to its earlier decision and entered

an order, dated June 30, 1971, which directed the hospital to cease and desist from refusing to bargain with Local 144 and extended its certification for one year from the date of its order or from the completion of any judicial review of that order.[4]

On Respondent's appeal of the SLRB's Order, the Appellate Division of the New York Supreme Court (39 A.D. 2d 913, 80 LRRM 3375) while upholding the SLRB's unit determination and its use of a self-determination election procedure, annulled the board's Order and directed a new election upon certain of the hospital's objections to the conduct of the election. The Court of Appeals in *College Hospital,* No. II, *supra,* reversed, finding:

> The Appellate Division was eminently correct insofar as it affirmed the board's determination that the hospital's skilled maintenance employees constituted an appropriate bargaining unit. . . .
>
> Accordingly, the board's practice, resulting in the establishment of a separate bargaining unit of skilled maintenance employees, seems eminently proper and, certainly, may not be stamped as either arbitrary or capricious.
>
> Nor, in our view is there any valid basis for the hospital's attack on the conduct to the election. . . . (85 LRRM 2581, 2582)

The SLRB bargaining order was reinstated and enforced. Respondent's Petition for a Writ of Certiorari was denied

[4] Respondent had excepted to the earlier adverse findings of the SLRB Trial Examiner. It had also moved to reopen the hearing and for reconsideration of that latter motion upon its denial.

by the United States Supreme Court on March 4, 1974, 415 U.S. 957.

Respondent thereupon entered into negotiations with the Union, nearly a decade after the certification first issued. It continued to maintain its position at these negotiations that the unit was inappropriate. Negotiations continued until mid-August 1975, at which time Respondent refused to bargain further, contending again that the unit was inappropriate. During the period of bargaining, on August 25, 1974, the hospital amendments to the National Labor Relations Act became effective. (Public Law 93-360).

B. *Analysis and Conclusions*

The Board has long held that it "will recognize the results of an election conducted by a responsible state agency, and therefore extend comity to a certification issued pursuant to such an election, where the state agency's election procedures conform to due process requirements and effectuate the policies of the Act." *Memorial Hospital of Roxborough,* 220 NLRB No. 73 sl. op. p. 4 (1975); *Screen Print Corporation,* 151 NLRB 1266 (1965); *The West Indian Co., Ltd.,* 129 NLRB 1203 (1961); *Bluefield Produce & Provision Company,* 117 NLRB 1660 (1957). Respondent asserts that the instant case does not call for the extension of comity because: the New York Statute is at odds with this Act; the unit found appropriate by the SLRB is inimical to the provisions of the Act in light of the legislative history of the recent hospital amendments; and, because of the lapse of time and concommitant changes in the unit since that certification.[5]

[5] No contention was made, and in view of the repeated resort to the courts at all levels, the many hearings and the detailed decisions issued herein, no contention could validly have been made that Respondent was not accorded due process.

1. Statutory Comparison

Respondent contended that the law applied by the SLRB in making its 1964 unit finding was so different from the Act that the application of comity was unwarranted. It cited, as the material variance, only the following portion of Section 705(2) of the State Act:

> [T]hat in any case where the majority of employees of a particular craft, or in the case of a non-profitmaking hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining.[6]

It is clear from a reading of the SLRB Decision, Order and Direction of Election (*The Long Island College Hospital,* 27 N.Y. SLRB 405) that the SLRB did not rely upon (and indeed was able to avoid application of) the aforequoted proviso in directing the election herein. Rather, the SLRB weighed the various factors traditionally considered by it (and by the NLRB) in reaching unit determinations, including homogeniety, earnings, interchange and history of collective bargaining, against *its policy* of avoiding "overcompartmentalization of hospitals into numerous small bargaining units" and found the factors to be evenly balanced.

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[6] The portion quoted by Respondent is the *proviso* to the following statutory provision:

> [705] 2. The board shall decide in each case whether, in order to insure employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided however . . . .

It thereupon, in a manner comparable to the NLRB in *The Globe Machine and Stamping Co.,* 3 NLRB 294, 299-300 (1937), determined to allow the balance to be tipped by the desires of the employees involved.

Evinrude Motors Division of Outboard Marine and Manufacturing Company, 66 NLRB 1142 (1946) and *Wilson-Hurd Mfg. Co.,* 68 NLRB 853 (1946), relied upon by Respondent (even assuming they represent the Board's present policy in regard to comity) are inapposite. In those cases the key factor was the State agency's lack of discretion in regard to the conduct of a separate craft election. In the instant case, the SLRB's direction of a self-determination election in the maintenance and engineering department was entirely an exercise of its reasoned discretion. That discretion was exercised only after general and specific hearings were held by the SLRB on the unit question. See *College Hospital* No. II, *supra,* 85 LRRM at 2582. Additionally, in both *Evinrude* and *Wilson-Hurd,* the State agency had directed craft elections after petitions for same had been dismissed by National Labor Relations Board Regional Directors, at times when the NLRB had jurisdiction, and in the face of existing and viable collective-bargaining relationships on broader bases.

Similarly inapposite are those cases relied upon by Respondent, (*Maloclm X Center for Mental Health,* 222 NLRB No. 147 (1976), *Mental Health Center of Boulder County, Inc.,* 222 NLRB No. 146 (1976) and *St. Luke's Hospital Center,* 221 NLRB No. 217 (1976)) wherein the Board refused to give comity to State agency unit determinations which, on their face were at variance with express statutory provisions, i.e., they included professional and nonprofessional employees in a single unit without the self-deter-

mination election required to be accorded professionals under Section 9(b)(1) of the Act. No such violation of express statutory mandate is involved herein.

Finally, I would note in this regard that Section 705(2) of the New York Statute is essentially identical to Section 9(b) of the Federal Act and the provisos to both provisions express similar concerns.[7] Both seek to protect professional employees and skilled craft employees from undesired inclusion in units comprised of persons of different interests, training, education and skills.

I therefore conclude that such differences as may exist between the National Labor Relations Act and the New York State Labor Relations Act do not render comity unwarranted. The statutes generally and as applied by the SLRB in this case are not inimical.

2. Unit Proliferation

It is true, as contended by Respondent, that the legislative history of the hospital amendments admonishes the Board to avoid undue proliferation of bargaining units in

[7] Section 9(b)(1) and (2) of the National Labor Relations Act reads:

> [Sec. 9](b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation. . . .

the health care industry.[8] Respondent contends that the maintenance-engineering department unit found appropriate herein constitutes such an undue proliferation. However, as the Board stated in the recent case of *Jewish Hospital of Cincinnati*, 223 NLRB No. 91 (1976):

> . . . Congress left the matter of the determination of appropriate units to the Board, and the desire for nonproliferation does not, in our judgment, necessarily preclude our granting maintenance units in the health care area. Congress was aware that the Board has sometimes found that a separate maintenance unit is appropriate if the maintenance employees possess a community of interest sufficiently separate and distinct from the broader community of interest which they share with other employees to warrant their inclusion in a separate unit. Yet, it did nothing to preclude our granting such units. Congress in fact rejected Senator Taft's suggestion that maintenance employees should always be combined with service employees in a single unit. (footnotes omitted.)

It is thus clear that the fact that a unit of the maintenance and engineering department is involved herein does not, of itself, warrant a rejection of the principle of comity. Indeed, it was just such a unit, Maintenance Department or Maintenance-Plant Operations, involving employees fulfilling the same work responsibilities as those herein, which was involved in *Memorial Hospital of Roxborough, supra.* The Board therein extended comity entirely upon the Pennsylvania Labor Relations Board's determination of all elec-

[8] S. Rept. 93-766, 93rd Cong., 2d sess. 5 (1974); See also H. Rept. 93-1051, 93rd Cong., 2d sess. 7 (1974); *Mercy Hospitals of Sacramento*, 217 NLRB No. 131 (1975).

tion issues, without further discussion of either unit appropriateness or unit proliferation.

Moreover, as noted *supra,* the SLRB early-on adopted a policy, similar to that expressed in the legislative history to the recent amendments, "against over-compartmentalization of hospitals into numerous small bargaining units," (*Matter of Wyckoff Heights Hospital,* 27 N.Y. SLRB 75, 82-83) and specifically applied that policy to the direction of election in the instant case. *Long Island College Hospital* 27 N.Y. SLRB 405, 411. As the New York Court of Appeals pointed out:

> Without merit is the hospital's argument that the unit selected may improperly fragment the hospital into numerous small units. . . . Actually, the board's practice in allowing skilled maintenance employees in hospitals to form a separate bargaining unit if they wish to do so, far from constituting over-compartmentalization, has avoided more serious fragmentation into numerous smaller units since, under the mandatory craft unit provision of subdivision 2 of section 705, each skilled craft, such as plumbers, painters and carpenters, could have demanded and could have been included in a separate unit. *College Hospital* No. II, *supra,* 85 LRRM at 2582.

3. The Lapse of Time

The Board, in *Memorial Hospital of Roxborough, supra,* reiterated its well settled rule "that in the absence of newly discovered or previously unavailable evidence or special circumstancs a respondent in a proceeding alleging a violation of Section 8(a)(5) of the Act is not entitled to relitigate issues which were or could have been litigated in

a prior representation proceeding." Respondent does not appear to rely upon any contention of newly discovered or previously unavailable evidence. It does, however, contend that the Union's responsibility for the lapse of time between the certification and the commencement of bargaining was a special circumstance which warranted relitigation and reconsideration of the unit determination. As previously noted, the Union initially chose an inappropriate avenue to challenge Respondent's refusal to bargain. The delay occasioned by its choice, from certification in December 1964 until the initial Court of Appeals decision in November 1968, caused that Court to place responsibility for the delay upon the Union. However, the Court also noted in a footnote to that comment that delay occurs *whenever* parties resort to the courts for the final adjudication of their disputes. *College Hospital* No. I, *supra,* 69 LRRM at 2609 fn. 5. Moreover, the same Court, by the same Judge, Chief Judge Fuld, in reaching its second decision in this matter, upholding Respondent's obligation to bargain, added:

> It is only necessary to add that there is no basis whatever for criticism of the union for its asserted delay in failing to file an unfair labor practice complaint. . . . As our court unequivocally stated in the *Roosevelt Hospital* case. . . . 'Delays occasioned by the union's exercise of what it reasonably believed to be its right under the statute [to invoke the mediation, fact-finding and compulsory arbitration proceedings of section 716] did not call for a redetermination of its status as a representative any more than would delays resulting from the slowness of administrative action or from the employer's pursuit of his judicial remedies in seeking court review of the board's certification.'

(*College Hospital* No. II, *supra,* 85 LRRM at 2585).[9] To Chief Judge Fuld's observations I would add only that the delay did not cease when the union chose the legally correct procedure. More time has passed since the Union filed its unfair labor practice charge than was spent prior thereto in pursuing what it then deemed to be an appropriate means for resolving the issues and bringing Respondent to the bargaining table.

The contention that the mere passage of time is a sufficient special circumstance to warrant relitigation is similarly without merit. To entertain such a defense would produce the anomalous result of permitting a Respondent to benefit from a lapse of time resulting from litigation for which it was responsible by virtue of its unlawful refusal to bargain. *Holly Farms Poultry Industries,* 189 NLRB 663 (1971). See also *Spitzer-Akron, Inc.,* 211 NLRB 114 (1972) and the dissenting opinion by Members Fanning and Jenkins in *George Braun Packing Co.,* 210 NLRB 1028, 1029 (1974).

Respondent also contended that "the SLRB's certification expired on March 4, 1975—one year after the Supreme Court denied the Hospital's request to review the New York Court of Appeals' bargaining order (415 U.S. 957)—so that there is nothing to give comity to." In so arguing, Respondent has misconceived the nature of a certification of representative. Certification is not a license which, upon the mere passage of time, expires as if it were a license to operate a motor vehicle. Rather, certification is a key

[9] Respondent emphasized Judge Fuld's assessment of blame upon the Union, in *College Hospital* No. I, in both oral argument and brief herein. It failed however, to make any references to the referred-to footnote or to Judge Fuld's subsequent decision, reassessing that responsibility.

which opens a collective-bargaining relationship. That relationship remains viable until some material circumstance arises to place the continued existence of that relationship in question. The passage of time, alone, is, as noted, not such a material circumstance. See, for example, *Ray Brooks* v. *N.L.R.B.,* 348 U.S. 96, 98 (1954); *King Radio Corporation,* 208 NLRB 578 (1974), enf'd 510 F. 2d 1154 (C.A. 10, 1975); *Laystrom Manufacturing Co.,* 151 NLRB 1482, 1483 (1965).

4. Changes in Unit Composition

Respondent has contended that changes in the unit composition is a special circumstance which warrants a redetermination of the unit question. It appears that the employee complement of the maintenance and engineering department has grown from approximately 55 in 1964 to 69 in 1976. Approximately 8 of the original 55 remain employees within this department. Others have assumed supervisory responsibilities in the department or left. While Respondent has not asserted, *in haec verba,* that this turnover has given rise to a reasonable basis for doubting the Union's majority, its assertions are equivalent to such an argument and the principles applicable to a doubt of majority based on turnover are applicable herein. In *Laystrom Manufacturing Co.,* 151 NLRB 1482, 1484 (1965), it was stated:

> Employee turnover standing alone does not provide a reasonable basis for believing that the Union had lost its majority since the prior election. The Board has long held that new employees will be presumed to support a union in the same ratio as those whom they have replaced.

See also, *Washington Manor Nursing Center (South),* 211 NLRB 315 (1974) and *Washington Manor Nursing Center (North),* 211 NLRB 324 (1974). Both cases were enforced, *N.L.R.B.* v. *Washington Manor, Inc.,* —— F. 2d ——, 89 LRRM 3044 (C.A. 6, 1975). Moreover, after the certification year, a union enjoys a rebuttable presumption of majority. No evidence, beyond turnover, has been offered to rebut that presumption here. *N.L.R.B.* v. *Washington Manor, Inc., supra.* Thus, to the extent that Respondent's argument implies a doubt of the Union's majority status, it is without merit.

5. Changes in Operations

Respondent has contended that changes in its operations warrant a redetermination of unit appropriateness. The record reveals that over the course of years, Respondent has built or acquired new buildings, terminated operations of some buildings and moved operations from older to newer buildings. All of the buildings remain in the same geographical area. Some equipment has been modernized and some more sophisticated technology added. As part of a departmental "reorganization" around 1969 (prior to enforcement of the SLRB's order to bargain), specific job titles for many of the maintenance and engineering department employees were eliminated. The work, responsibilities and contact with employees of other departments, of the maintenance-engineering employees remained unchanged, however, and a number of the employees have continued to this day to perform such specialized and skilled functions as plumber, electrician and refrigeration mechanic. At the same time, new supervisory positions within the department were created, assigning responsibility for particular maintenance tasks to lower level supervisors. These supervisors continue to report to a Director of Engineering who has overall supervision and responsibility for the maintenance and engineering department. Such changes do not materially affect the community of interest of the maintenance and engineering department employees. See *Rittling Corporation,* 203 NLRB 355 (1973).

6. Conclusion

As neither the lapse of time nor the aforementioned changes present special circumstances sufficient to warrant relitigation of the unit issues as determined by the SLRB, and as neither the New York Statute nor the SLRB Decision and Direction of Election provide a basis for the denial of comity, it is appropriate, under established Board precendent, that comity be given to the SLRB determination. Accordingly, I find that the employees in Respondent's maintenance of plant and engineering department constitute a unit appropriate for the purpose of collective bargaining. I conclude that by breaking off negotiations with the Union in mid-August 1975, because it believed that unit to be inappropriate for collective bargaining purposes, Respondent has failed and refused to bargain in good faith with the Union in violation of Section 8(a)(5) of the Act.

IV. Conclusions of Law

1. The Long Island College Hospital is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Local 144, Hospital Nursing Home and Allied Services Union, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees in the maintenance of plant and engineering department, excluding chief engineers, assistant chief engineers, clerk and maintenance supervisor, and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 28, 1964, the above-named labor organization has been and is now the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 14, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that it be ordered to cease and desist therefrom and to take affirmative action to effectuate the policies of the Act.

As Respondent's violations go to the very heart of the Act, the recommended Order shall require Respondent to cease and desist from it any other manner infringing upon the rights guaranteed to its employees by Section 7 of the Act. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C.A. 4, 1941).

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record in this proceeding and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

Order

Respondent, The Long Island College Hospital, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with Local 144, Hotel, Hospital Nursing Home and Allied Services Union, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

All full-time and regular part-time employees in the maintenance of plant and engineering department, excluding chief engineers, assistant chief engineers, clerk and maintenance supervisor, and all supervisors as defined in Section 2(11) of the Act.

(b) In an other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at The Long Island College Hospital, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 29 after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Rea-

[11] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

sonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. Jun 4 1976

/s/ MICHAEL O. MILLER
Michael O. Miller
Administrative Law Judge

Supreme Court, U. S.
FILED
MAR 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1160

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME and ALLIED HEALTH SERVICES UNION, SEIU, AFL-CIO,
Petitioner,

v.

THE LONG ISLAND COLLEGE HOSPITAL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF OF RESPONDENT THE LONG ISLAND COLLEGE HOSPITAL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1160

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME and ALLIED HEALTH SERVICES UNION, SEIU, AFL-CIO,
Petitioner,

v.

THE LONG ISLAND COLLEGE HOSPITAL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF OF RESPONDENT THE LONG ISLAND COLLEGE HOSPITAL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The petition should be denied.

Petitioner, Local 144, seeks to impose on this Court's time by asking it to review and reverse the judgment of the Court of Appeals for the Second Circuit that Judge

Friendly's scholarly opinion for the court shows beyond doubt is correct.* The Court of Appeals held that respondent, National Labor Relations Board ("NLRB"), did not comply with the National Labor Relations Act, as amended, 29 U.S.C. §§141 *et seq.* ("Act") when, under the guise of comity, it deliberately failed to consider the facts in the record and blindly rubber stamped the New York State Labor Relations Board's thirteen year old determination under the New York State Labor Relations Act, *New York Labor Law* §§700, *et seq.*, that respondent, The Long Island College Hospital's ("LICH") maintenance employees were an appropriate collective bargaining unit.

Local 144 argues that the Court of Appeals' decision in this case conflicts with decisions of the Courts of Appeals for the Third and Eighth Circuits, fosters a lack of uniformity in the administration of the Act and is of recurring importance regarding the application of the nonprofit hospital amendments to the Act, P.L. 93-360, 88 Stat. 395. Apparently the NLRB disagrees. It too lost before the Court of Appeals, but it is not asking this Court to grant a writ of certiorari and is now considering this case on remand.** LICH submits that the Court should deny Local 144's petition forthwith because (A) there is no conflict among the circuits, (B) the Court of Appeals' decision promotes uniformity in the administration of the Act, (C) the question with respect to "comity" the Court of Appeals decided was almost unique and certainly will not reoccur frequently, and (D) the Court of Appeals was right.

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* Judge Friendly's opinion is reported at 566 F.2d 833 (2d Cir. 1977).

** See letter dated January 17, 1978 from George A. Leet, NLRB Associate Executive Secretary, to counsel for the parties before the NLRB, which is reproduced in the appendix to this brief.

A. There is no conflict among the circuits. In both this case below and *Memorial Hospital of Roxborough* v. *NLRB*, 545 F.2d 351 (3rd Cir. 1976), the NLRB refused to consider the facts, granted comity to a state labor relations agency's determination that hospital maintenance employees constituted appropriate units for purposes of collective bargaining, and directed the hospitals involved to bargain.

In both cases the Courts of Appeals refused to enforce the NLRB's bargaining orders relying on the text of the Act (R356-57, 360, A13-14),* the courts' analysis of the legislative history of the nonprofit hospital amendments, which the NLRB acknowledged specifically cautioned against proliferating bargaining units at hospitals (R360-61, A9-12 and 23), the need for a uniform national policy for bargaining units at hospitals (R360, A15, 25), and the courts' analysis of the NLRB's prior comity cases, none of which are inconsistent with this case or *Roxborough* because each involved a bargaining unit over which there was no dispute between the employer and the union (R358-59, A14-15 and n.3).**

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* Numbers in parentheses prefixed "R" refer to pages of the *Roxborough* decision starting at 545 F.2d 351 and numbers prefixed "A" refer to pages of the Second Circuit's decision below contained in the Appendix to the Petition herein.

** *St. Joseph's Hospital* v. *NLRB*, 542 F.2d 495 (8th Cir. 1976), *enforcing*, 221 NLRB 1253 (1975) does not express a conflicting view of comity as Local 144 contends. Rather it approved comity where the appropriateness of the unit the state agency certified was not contested before the state agency or the NLRB. In *St. Joseph's* the employer contended merely that the state had denied it due process and that the state's "accretion" procedure was inconsistent with the NLRB's "accretion" procedure. 221 NLRB at 1257-58. The parties did not raise the questions of what employees constitute an appropriate bargaining unit under the Act, or whether the state agency's bargaining unit determination passed muster under the Act, and the court did not consider or decide those questions.

In both cases the Courts of Appeals granted the hospitals' petitions for review, and remanded to the NLRB with instructions to determine from an analysis of the facts whether the units the state agency found appropriate were appropriate under the Act (R362, A26-28).*

These overwhelming similarities show there is no conflict between the two Courts of Appeals. The court below concluded that the *Roxborough* majority, contrary to the dissenting judge, had held that the NLRB may never apply comity to contested state agency bargaining unit determinations. The court below did not disagree. It simply said:

> "We are not here required to choose between these two able opinions. *Even if it were to be assumed, for purposes of argument only, that we might take the dissent's view* that the NLRB may sometimes apply 'comity' to state unit determinations, great care must be exercised to make sure that the state decision at issue was precisely 'congruent with federal policy' " (A16) (emphasis added).

Having announced that it would reason *arguendo,* the Second Circuit considered the same factors that had led the

* Petitioner's attempt to suggest that a conflict exists between the "instructions" to the NLRB on the remands of the two cases is answered in the opinion below. Noting that the *Roxborough* court permitted the NLRB to reissue a bargaining order without a new election in that case if, after a proper analysis of the facts, the NLRB determines that the unit the state agency found was appropriate is appropriate under the Act, the court below said "If the facts here were similar to those in *Roxborough,* we might well follow the course taken in that case" (A26). However, the Second Circuit noted that in *Roxborough* the election had been held "only some three years" earlier (A26) and concluded that the presumption of continued majority status prevailed. In this case, however, the court noted that the presumption could not prevail and Local 144 lawfully could not be certified without a new election because "the interval is 13 years and only 8 of the 55 employees who were in the unit in 1963 are still members of the present unit of 69" (A27).

Third Circuit to conclude that comity in contested bargaining unit cases is improper *per se,* and concluded from these factors that comity certainly would be improper in this case since the NLRB itself had issued a number of apparently conflicting decisions concerning bargaining units at hospitals (A21-25).

Thus, if this Court were to resolve what Local 144 calls the "conflict" between the Third Circuit in *Roxborough* and the Second Circuit in this case by adopting the position of the *Roxborough* court, that resolution would not change the result below and accordingly the "conflict" is not a real one. R. Stern and E. Gressman, *Supreme Court Practice* 158 para. (6) (4th Ed. 1969). In short, there is no conflict among the circuits.

B. The decision of the court below promotes uniformity in the NLRB's bargaining unit determinations at hospitals.

In this case, the Court of Appeals correctly recognized that the NLRB's bargaining unit decisions in hospital cases are in "disarray" (A25)—some holding maintenance units appropriate—and others presenting similar facts holding that maintenance units are not appropriate (A21-22). Certainly with the NLRB's own decisions at sixes and sevens, permitting the NLRB to ignore the record and adopt the stale 13 year old bargaining unit determination of a state agency under a statute quite different than the Act (A18-21) can only promote a lack of uniformity in bargaining unit determinations, which is exactly what Congress wanted to avoid when it passed the nonprofit hospital amendments to the Act (A11-12). Hence, reversing the Court of Appeals in this case would not promote uniformity in the NLRB's

administration of the Act—it would do exactly the opposite contrary to the will of Congress.

C. This case does not present a recurring problem in the administration of the Act. To our knowledge, the only cases since the nonprofit hospital amendments to the Act became effective on August 26, 1974—three and one half years ago—that have presented the question of whether the NLRB may grant comity to a state agency's bargaining unit determination are this case, *Memorial Hospital of Roxborough* v. *NLRB, supra,* and *Allegheny General Hospital,* 230 NLRB No. 134 (1977), *petition for review pending,* Third Circuit Docket No. 77-2090. For the issue to arise only three times in three and one-half years shows that it is unlikely to arise frequently in the future. Indeed, the issue would have to arise close to the time when the NLRB assumed jurisdiction over nonprofit hospitals (August 26, 1974) or be lost through the hospital's and the union's bargaining history under the Act after jurisdiction passed from the state agency to the NLRB. *Fraser & Johnston Co.,* 189 NLRB 142, 151 n. 50 (1971); *Great Atlantic & Pacific Tea Co., Inc.,* 153 NLRB 1549 (1965). Thus, even if the Court of Appeals were wrong on the comity issue, which it clearly was not, there would be no reason for this Court to review its decision.

D. The Court of Appeals was right. In holding that the NLRB had no authority under the Act to abdicate its duty in favor of the New York State Labor Relations Board to decide whether LICH's maintenance employees are a unit appropriate for collective bargaining under the Act, the Court of Appeals relied not only on the express legislative history justifying its holding, but also on this

Court's holding in *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U.S. 18, 26 (1949), and the Act's express terms.

As the legislative history the Court of Appeals cited (A11-12) shows, Congress expressly rejected deferring to prior state agency decisions on bargaining unit issues. In *La Crosse Telephone Corp., supra,* this Court held that

> "A certification by a state board under a different or conflicting theory of representation may threfore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision." 336 U.S. at 26.

This shows that this Court already has mandated that the NLRB not defer to state agency bargaining unit determinations, but should decide bargaining unit questions itself.

Finally, section 9(b) of the Act, 29 U.S.C. §159(b), expressly states that

> "*The Board shall decide* in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ." (emphasis added).

No language could more clearly show that the NLRB may not delegate its power to decide what employees constitute "the unit appropriate for the purposes of collective bargaining" to a state agency, particularly where, as the Court of Appeals noted here, the state statute and the Act "[o]n their face . . . are significantly different" (A18).

CONCLUSION

For all the foregoing reasons, this Court should deny Local 144's petition for a writ of certiorari.

Respectfully submitted,

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Of Counsel:
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ROGER J. KARLEBACH

March 15, 1978

APPENDIX

Letter Dated January 17, 1978 from Associate Executive Secretary of the NLRB

[LETTERHEAD OF]

NATIONAL LABOR RELATIONS BOARD

[SEAL]

Washington, D.C. 20570

January 17, 1978

Re: The Long Island College Hospital
Case No. 29-CA-4562

Martin D. Heyert, Esquire
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Samuel M. Kaynard, Regional Director
National Labor Relations Board
Region 29
16 Court Street — 4th Floor
Brooklyn, New York 11241

Gentlemen:

The Board has decided to accept the remand from the Court of Appeals in the above case and all parties are hereby notified that they may file Statements of Position with the Board with respect to the issues raised by the remand. Such Statements of Position must be received by the Board on or before February 1, 1978 and must conform with Section 102.46(j) of the Board's Rules and Regulations.

After receipt of any Statements of Position filed, the Board will proceed to review the matter and take appropriate action consistent with the Court's remand. All parties will be advised of whatever action the Board takes.

Very truly yours,

/s/ GEORGE A. LEET
George A. Leet
Associate Executive Secretary

Supreme Court, U. S.
FILED
APR 8 1978
MICHAEL RODAK, JR., CLERK

No. 77-1160

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME AND ALLIED HEALTH SERVICES UNION, SEIU, AFL-CIO,
PETITIONER

v.

THE LONG ISLAND COLLEGE HOSPITAL and
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1160

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME AND ALLIED HEALTH SERVICES UNION, SEIU, AFL-CIO,
PETITIONER

v.

THE LONG ISLAND COLLEGE HOSPITAL and
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The National Labor Relations Board ("the Board") found that the Long Island College Hospital ("the Hospital") violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 61 Stat. 140-141, 29 U.S.C. 158(a)(5) and (1) by refusing to bargain with petitioner ("the Union") as the representative of a unit of maintenance and engineering employees. In doing so, the Board extended comity to a decision of the New York State Labor Relations Board ("SLRB") finding such

a unit to be appropriate for collective bargaining (Pet. App. B 19).[1]

In extending comity to the state unit determination, the Board rejected the Hospital's contention that to do so would ignore the legislative history of the "Hospital Amendments" (note 1, *supra*), which admonishes against undue proliferation of bargaining units in health care institutions (Pet. App. B 12 to B 14). The Board found that, although the state statute contained a mandatory craft unit provision,[2] the SLRB did not rely upon or apply that

[1]Pursuant to petitions filed with the SLRB by the Union seeking to represent the Hospital's service and maintenance employees, and by a rival union seeking to represent just the maintenance and engineering employees, the SLRB ruled that a separate unit of maintenance and engineering employees and a combined service and maintenance unit were equally appropriate for collective bargaining. The SLRB accordingly directed an election in which the Hosptial's maintenance and engineering employees were afforded an opportunity to vote on whether they wanted a separate unit, and, if so, whether they desired the Union as their representative. *The Long Island College Hospital*, 27 SLRB 405. The election resulted in the selection of a separate bargaining unit by the maintenance and engineering employees, and a victory for the Union in that unit. When the Hospital refused to bargain on the ground that the unit was inappropriate, the SLRB issued a bargaining order (34 SLRB 324), which was upheld on appeal. *Long Island College Hospital* v. *New York State Labor Relations Board, et al.*, 32 N.Y. 2d 314, 298 N.E. 2d 614, certiorari denied, 415 U.S. 957.

Thereafter, the Hospital entered into negotiations with the Union, but when the NLRA was amended, effective August 25, 1974, to extend its coverage and protection to employees of nonprofit health care institutions, Act of July 26, 1974, 88 Stat. 395, the Hospital refused to bargain further, asserting once again that the unit was inappropriate. The Union then filed an unfair labor practice charge with the Board. (Pet. App. B 9.)

[2]The proviso to Section 705(2) of the New York State Labor Relations Act (McKinney 1977) provides (Pet. App. B 10):

> [T]hat in any case where the majority of employees of a particular craft, or in the case of a non-profitmaking hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining.

provision here. "Rather, the SLRB weighed the various factors traditionally considered by it (and by the NLRB) in reaching unit determinations, including homogeneity, earnings, interchange and history of collective bargaining, against *its policy* of avoiding 'over-compartmentalization of hospitals into numerous small bargaining units' and found the factors to be evenly balanced" (Pet. App. B 10; emphasis in original). The Board also pointed out that the NLRA, as amended, does not preclude it from finding appropriate a unit limited to maintenance employees (Pet. App. B 13). Finally, the Board found that, contrary to the Hospital's assertions, neither the passage of time, employee turnover, nor changes in the Hospital's operations had rendered the separate unit of maintenance employees inappropriate (Pet. App. B 14 to B 19).

2. The court of appeals, granting the Hospital's petition for review, remanded the case to the Board for further proceedings (Pet. App. A 1 to A 28). It found that the SLRB's conclusion that a single maintenance unit agreed with state policy against over-compartmentalization was based in large part on the fact that, under the state craft provision (note 2, *supra*), these skilled craft employees could have demanded their own bargaining units and thereby forced the SLRB into still further compartmentalization. No such consideration would be present in a Board unit determination, because there is no comparable right under the NLRA. Accordingly, the court concluded that the state law was not sufficiently congruent with federal law to justify application of comity principles. (Pet. App. A 18 to A 21.)[3]

[3]In light of its conclusion that the federal and state laws were incongruent, the court found it unnecessary to reach the issue decided in *Memorial Hospital of Roxborough* v. *National Labor Relations Board*, 545 F. 2d 351 (C.A. 3), *i.e.*, whether Section 9(b) of the NLRA, 29 U.S.C. 159(b), precludes the Board from extending comity to state unit determinations (Pet. App. A 16).

The court remanded the case to the Board to make its own determination of an appropriate bargaining unit based on evidence already adduced before its Administrative Law Judge and such further evidence as it may deem necessary. In view of the fact that the Union was certified 13 years ago and only 8 of the original 55 employees are still unit members, the court further held that, should the Board find a maintenance unit appropriate, it could not rely on the results of the state election but must direct a new election. (Pet. App. A 27 to A 28.)

3. The Board will accord comity to state representation proceedings where the state procedures conform to due process requirements and are consistent with the policies of the NLRA. See, *e.g.*, *Mercy-Memorial Hospital Corp.*, 221 NLRB 1, 2-3, enforcement proceedings pending, C.A. 6, No. 76-2338; *St. Joseph's Hospital*, 221 NLRB 1253, enforced, 542 F. 2d 495 (C.A. 8). The court below did not reach the question whether this policy is valid (cf. *Memorial Hospital of Roxborough* v. *National Labor Relations Board*, 545 F. 2d 351 (C.A. 3)) because it concluded, contrary to the Board, that the State unit determination was influenced by principles of state law inconsistent with the NLRA. Accordingly, the question presented is whether the court below erred in so concluding. While the Board believes that the court erred, it did not file a petition for certiorari because, in its judgment, the decision is limited to the facts of this case and does not reject the Board's comity policy. Should the Union's petition be granted, however, the Board will defend its decision and order.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

APRIL 1978.

DOJ-1978-04